Supreme Court, U.S.
FILED

136 (1)

09-192 AUG 11 2009

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No.

IN THE

Supreme Court of the United States

SHERREL AND LESLIE STEPHEN JONES, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court below interpreted 26 U.S.C. § 1221(a)(3)(B) too broadly in light of conflicting revenue rulings by holding that Petitioner was not entitled to a charitable contribution deduction on the material in question because it constituted a letter, memorandum or similar property that was prepared and produced for Petitioner's benefit.

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I

OPINIONS BELOW

The opinion issued by the United States Court of Appeals for the Tenth Circuit (App., *infra*, 1a) is reported at 560 F.3d 1196 (10th Cir. 2009). The opinion of the Tax Court (App., *infra*, 12a) is reported at 129 T.C. 146 (2007).

JURISDICTION

The decision of the United States Court of Appeals for the Tenth Circuit, affirming the decision of the United States Tax Court on other grounds, was handed down on March 27, 2009. A timely petition for rehearing was denied (App., *infra*, 32a) on May 13, 2009. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

26 U.S.C. § 1221(a)

> For purposes of this subtitle, the term 'capital asset' means property held by a taxpayer (whether or not connected with his trade or business), but does not include -
>
> * * *
>
> (3) a copyright, a literary, musical, or artistic composition, a letter or memorandum, or similar property, held by –
>
> (A) a taxpayer whose personal efforts created such property,

(B) in the case of a letter, memorandum, or similar property, a taxpayer for whom such property was prepared or produced, or
(C) a taxpayer in whose hands the basis of such property is determined, for purposes of determining grain from a sale or exchange, in whole or part by reference to the basis of such property in the hands of a taxpayer described in subparagraph (A).

STATEMENT

In July 2004 the Commissioner of Internal Revenue (Commissioner) issued a notice of deficiency to Petitioners Sherrel and Stephen Jones for the years 2000 and 2001 in the amount of $14,784.99. The basis for the deficiency was the Commissioner's determination that Petitioners improperly claimed an income tax deduction for a charitable contribution of discovery material that Stephen Jones acquired while serving as lead defense counsel in the Oklahoma City bombing trial.

Petitioners filed a petition in United States Tax Court, seeking a redetermination of the deficiencies. The tax court issued its opinion, first ruling that Petitioner Stephen Jones did not own the donated material under Oklahoma law. (App., *infra*, 28a) The tax court determined that the material was provided to Stephen Jones only in his representative capacity as lead defense counsel for Timothy McVeigh. Relying on precedent from jurisdictions outside Oklahoma and the Oklahoma Rules of Professional Conduct, the tax court held that primary ownership in an attorney's case file belongs with the client and not the attorney. (App.,

infra, 21a-28a) In the alternative, the tax court ruled that if Petitioner owned the donated material, it was not a "capital asset" **because it qualified as letters, memoranda, and similar property prepared by Petitioner's personal efforts.** (App., *infra*, 30a) Such property is excluded from the definition of "capital asset" pursuant to 26 U.S.C. § 1221(a)(3)(A), and the deduction value is limited to Petitioner's basis in the property. Since Petitioner's basis was zero, the tax court held that Petitioners (filing jointly) could not claim a charitable contribution deduction.

On appeal, the Tenth Circuit affirmed the tax court's ruling, but did so on entirely different grounds. The circuit court concluded that the discovery material Petitioners donated to the University of Texas must be excluded from the definition of "capital asset" because it constituted a letter, memoranda or similar property that was prepared and produced for Petitioner's benefit pursuant to 26 U.S.C. § 1221(a)(3)(b). (App., *infra*, 7a) In other words, the circuit found that the material in question was prepared and/or produced for Stephen Jones as lead defense counsel for Timothy McVeigh and therefore must be excluded from the definition of capital asset pursuant to § 1221(a)(3)(b).

This Petition seeks to have the Court review the circuit court's interpretation of 26 U.S.C. § 1221(a)(3)(B) in light of the absence of case law on the subject and conflicting Internal Revenue Code rulings involving the same statutory section. While this Court is not bound by such rulings and they may not be cited as precedent, Petitioners bring them to the Court's attention as evidence that the statute has been interpreted in varying ways.

REASON FOR GRANTING THE PETITION

The materials donated to the University of Texas were items that Timothy McVeigh received from the government. These items included FBI 302s, FBI notes, photographs taken by the government, state medical examiner's reports and other investigative material compiled by the government for the prosecution of the perpetrator of the bombing of the Alfred P. Murrah building. They were compiled for the government's use and then a copy was provided to Mr. McVeigh. **The set in question was Petitioner's copy of what the government had already prepared, produced and organized for its own benefit in the prosecution of Mr. McVeigh.**

The Federal Rules of Criminal Procedure, the Jencks Act, 18 U.S.C. § 3500 (West 2007), *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and other rules and procedures require the government in criminal cases to provide the defense with certain discovery documents. In the case of *United States v. McVeigh*, the government went above and beyond what they were required to produce under the law. The overwhelming majority of material that furnished the gift for which a deduction was claimed far exceeded any requirement under Rule 16 or *Brady*. The Commissioner conceded this point before the tax court when it acknowledged that "[t]he individual items included in the 'archive' were not created by or for petitioner." (Doc. No. 21, Opening Br. of Resp., filed 4/12/07 at 39) The circuit court's conclusion to the contrary, *i.e.*, that the material was prepared and/or produced for Petitioner, required

an overly broad interpretation of 26 U.S.C. § 1221(a)(3)(B), and one that is in conflict with the Commissioner's previous interpretations of that section.

The Internal Revenue Service, in Revenue Ruling 75-342, considered whether bound volumes of the Congressional Record accumulated by a taxpayer, a member of the United States Congress during his tenure in office, constituted literary compositions, letters or memorandums, or similar property, within the meaning of 26 U.S.C. § 1221(a)(3). *See* Rev. Rul. 75-342, 1975-2 C.B. 341, 1975 WL 34974. "*Held*, the bound volumes of the Congressional Record accumulated by the taxpayer are not literary compositions, letters or memorandums, or similar property, within the meaning of section 1221(3) of the Code." *Id.*

In *Glen v. Commissioner*, 79 T.C. 208, 214 (1982), the tax court analyzed the term "similar property" for purposes of § 1221-1(c)(2) and concluded that the statute is dealing with property created by a taxpayer. "Since the statute is obviously geared to a type of property which a taxpayer himself creates, in our view, the regulation including transcripts of an oral recording or an oral recording of any type of transcript of an oral interview is a proper interpretation of similar property referred to in the statute." *Id.* (citing § 1.1221-1(c)(2)).

In Internal Revenue Service Technical Advice Memorandum 8240009, the taxpayer, a physicist who worked on the Manhattan Project to develop the atomic bomb during World Ward II (as well as serving as a civilian technical advisor on one of the flights that

dropped an atomic bomb on Japan), retrieved non-classified strike orders for the two atomic bomb missions as the orders were about to be discarded by military authorities or after they had been discarded. The taxpayer donated these strike orders to a qualifying charitable organization and claimed a charitable contribution deduction for the fair market value of the documents. The IRS held that the strike orders donated by the taxpayers were capital assets as defined by § 1221 because the documents were not government publications within the meaning of § 1221(5) and thereby excluded from the definition of capital assets.

In both of the above-referenced IRS rulings (which Petitioners acknowledge are not precedent) a narrower application of the statutory language was applied to the factual scenario presented. While the circuit court relied upon this Court's holding in *Corn Products Refining Co. v. Commissioner*, 350 U.S. 46, 52, 76 S.Ct. 20, 100 L.Ed. 29 (1955), for the reasoning that exclusions to the definition of capital asset should be interpreted broadly, it is clearly not done so in all situations, and this case presents an issue of first impression, and one that is in conflict with the Commissioner's own interpretive rulings.

The circuit court correctly noted that the Commissioner conceded that the property which Appellant claimed as a charitable contribution was not created by Petitioner's own efforts (App., *infra*, 7a), but it failed to recognize that the Commissioner also conceded that "[t]he individual items included in the 'archive' were not created . . . for petitioner." (Doc. No. 21, Opening Br. of Resp., filed 4/12/07 at 39)

(emphasis added). Contrary to the factual scenario of *Morrison v. Commissioner*, 71 T.C. 683 (1979), in which letters to and from a congressman were deemed prepared or produced for him, the documents in the present case were not prepared or produced specifically for Stephen Jones within the statutory meaning of § 1221.

The circuit court initially rightfully acknowledged this fact, stating that "the discovery material was not originally created for Taxpayer's benefit. Rather, the Government first compiled the material to assist in its investigation and prosecution of McVeigh." (App., *infra*, 9a) However, in the absence of guidance from IRS regulations and/or reported case law on the meaning of "for whom such property was prepared or produced," the circuit court reverted to the dictionary to determine the plain and ordinary meaning of "prepared or produced." (App., *infra*, 8a-9a) Whereupon, the circuit court concluded that the government "offered" or "presented" the material to Petitioner for his "view," "consideration," and "use" in representing McVeigh. (App., *infra*, 9a) Contrary to the circuit court's finding (App., *infra*, 10a), the bulk of the material making up the donation was not the typical discovery material produced pursuant to Rule 16 or *Brady*. As such, the court applied 26 U.S.C. § 1221(a)(3)(B) too broadly in excluding the material in question from the definition of capital asset.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request the issuance of a writ of certiorari to the United States Court of Appeals for the Tenth

Circuit.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 08-9001

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SHERREL AND LESLIE STEPHEN JONES,
Petitioners-Appellants,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

APPEAL FROM THE UNITED STATES TAX COURT. (Case No. 20253-04).

COUNSEL: Leslie Stephen Jones (April M. Davis, Jones, Otjen & Davis, Enid, Oklahoma, and Clarke L. Randall, Kornfield, Franklin, Renegar & Randall, Oklahoma City, Oklahoma, with him on the briefs), Jones, Otjen & Davis, Enid, Oklahoma for Petitioners-Appellants.

Patrick J. Urda (Nathan J. Hochman, Assistant Attorney General, and Richard Farber, Attorney, Tax Division, Department of Justice with him on the briefs), Attorney, Tax Division, Department of Justice, Washington, D.C. for Respondent-Appellee.

JUDGES: Before TACHA, BALDOCK, and O'BRIEN, Circuit Judges.

OPINION BY: BALDOCK

OPINION

BALDOCK, Circuit Judge.

In July 2004 the Commissioner of Internal Revenue (Commissioner) issued a notice of deficiency to Petitioners Sherrel and Leslie Stephen Jones for the years 2000 and 2001 in the amount of $ 14,784.99. The basis for the deficiency was the Commissioner's determination that Petitioners improperly claimed a large income tax deduction for a charitable contribution of discovery material that Leslie Stephen Jones acquired while serving as lead defense counsel in the Oklahoma City Bombing trial. Petitioners contested the deficiency notice in United States Tax Court, and now appeal the tax court's judgment upholding the Commissioner's determination. We have jurisdiction under 26 U.S.C. § 7482(a)(1). Although our rationale differs from the tax court, we affirm.

I.

Taxpayer Leslie Stephen Jones n1 was lead defense counsel for Timothy McVeigh in the Oklahoma City Bombing trial. During the course of his representation, the Government provided Taxpayer with voluminous discovery material related to the prosecution of McVeigh. The same discovery material was furnished to the Oklahoma State Bureau of Investigation, the Oklanoma County District Attorney's Office, and counsel for McVeigh's co-defendant, Terry Nichols. The material included, *inter alia*, copies of FBI witness statements, FBI lab notes, photographs, and computer discs. After McVeigh was convicted in August 1997, Taxpayer withdrew as lead defense counsel. Subsequently, in December 1997, Taxpayer donated the discovery material to the Center for American History at the University of Texas.

Prior to the donation, Taxpayer had the discovery material appraised by an expert at a value of $ 294,877.00. Taxpayer claimed a deduction for the material on his 1997 income tax return. The excess amount of the deduction was carried over to subsequent tax years. In 2004 the Commissioner noticed Taxpayer for income tax return deficiencies of $ 3,675.00 in 2000 and $ 11,109.99 in 2001. n2 The Commissioner informed Taxpayer that he did not "own" the donated material and, therefore, could not claim a charitable contribution deduction. Moreover, the Commissioner explained that the amount reportable as a deduction was limited to ordinary income or short-term capital income (*i.e.*, the discovery material was not a long-term capital asset). Because the material was either ordinary income or short-term capital income, the amount of the deduction was limited to Taxpayer's basis in the donated property (*i.e.*, the purchasing price of the discovery material or the amount Taxpayer invested in the discovery material). Taxpayer's basis in the discovery material was zero and, therefore, the amount he could claim as a charitable contribution was zero.

Taxpayer filed a petition in United States Tax Court, seeking a redetermination of the deficiencies. The tax court issued its opinion, first ruling that Taxpayer did not own the donated material under Oklahoma law. See *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 722, 105 S. Ct. 2919, 86 L. Ed. 2d 565 (1985) (noting that when applying federal tax law, state law controls the nature of the taxpayer's interest in property). In support of its decision, the tax court determined that the material was provided to Taxpayer only in his representative and agent capacity for McVeigh.

Relying on precedent from jurisdictions outside Oklahoma, and the Oklahoma Rules of Professional Conduct, the tax court held that primary ownership in an attorney's case file lies with the client and not the attorney. Thus, Taxpayer did not own the donated discovery material.

The tax court also ruled, in the alternative, that if Taxpayer owned the discovery material, it was not a "capital asset," and, therefore, the amount Taxpayer could claim as a deduction was equal to his basis in the donated material. Specifically, the tax court held that the donated discovery material qualified as letters, memoranda, and similar property prepared by Taxpayer's personal efforts. Such property is excluded from the Internal Revenue Code's (IRC) definition of "capital asset," 26 U.S.C. § 1221(a)(3)(A), and the deduction value is limited to Taxpayer's basis in the property. Because Taxpayer's basis was zero, the tax court held he could not claim a charitable contribution deduction.

II.

We review the tax court's decision in the same manner as we review a district court decision tried without a jury. See *Watkins v. Comm'r*, 447 F.3d 1269, 1271 (10th Cir. 2006). We review legal questions de novo and factual questions for clear error. See id. As noted, the tax court held that Taxpayer was not entitled to claim a deduction on the donation of the discovery material for two reasons: (1) Taxpayer did not own the discovery material, and (2) the discovery material was not a capital asset. Because we hold that the discovery material is not a capital asset, we need not decide

whether Taxpayer owned the discovery material under Oklahoma law. As the following discussion demonstrates, however, our rationale for determining that the discovery material is not a capital asset differs from that of the tax court.

A.

The value of a charitable contribution of property, and thus the value that can be deducted from an income tax return, is reduced by "the amount of gain which would *not have been long term capital gain* if the property had been sold by the taxpayer at its fair market value." 26 U.S.C. § 170(e)(1)(A) (emphasis added). Thus, unless the property is a capital asset providing long term capital gain, the property qualifies as ordinary income and a taxpayer's deduction is limited to his cost or basis in the property. See *Maniscalco v. Comm'r*, 632 F.2d 6, 8 (6th Cir. 1980) (noting that the allowable deduction for ordinary income property is limited to the donor's cost basis in such property); *Glen v. Comm'r*, 79 T.C. 208, 211-12 (1982) (recognizing that the effect of § 170(e)(1)(A) is to limit the allowable deduction for the donation of a non-capital asset to the taxpayer's cost or basis in the property). In other words, if a Taxpayer has no basis in a piece of property, the gross and net return on a hypothetical sale of that property would be the same, *i.e.*, the full sale price. Thus, unless the property was a long term capital asset, § 170(e)(1)(A) would require that the deduction for donating that property be reduced by the property's *entire* value--leaving the taxpayer with no deduction at all.

Two requirements must be met to claim a deduction for long term capital gain. First, a taxpayer must prove he

has owned the donated property for more than one year. n3 See 26 U.S.C. § 1222(3) (defining "long term capital gain" as the "gain from the sale or exchange of a capital asset held for more than [one] year"). Second, the donated property must meet the statutory definition of a capital asset. See 26 U.S.C. § 1221(a) (defining "capital asset" as "property held by the taxpayer (whether or not connected with his trade or business)"). Section 1221 of the IRC excludes five specific classes of property from its broad definition of capital asset. See *Arkansas Best Corp. v. Comm'r*, 485 U.S. 212, 215-16, 108 S. Ct. 971, 99 L. Ed. 2d 183 (1988). The only exclusion relevant to our inquiry is the following:

a copyright, a literary, musical, or artistic composition, a letter or memorandum, or similar property, held by—

(A) a taxpayer whose personal efforts created such property,

(B) in the case of a letter, memorandum, or similar property, a taxpayer for whom such property was prepared or produced, or

(C) a taxpayer in whose hands the basis of such property is determined, for purposes of determining gain from a sale or exchange, in whole or part by reference to the basis of such property in the hands of a taxpayer described in subparagraph (A) or (B).26 U.S.C. § 1221(a)(3).

As noted, the tax court ruled that if Taxpayer owned the discovery material, it was excluded under the IRC's definition of capital asset pursuant to 26 U.S.C. §

1221(a)(3)(A). Specifically, the tax court held that the discovery material qualified as "letters, memoranda, or similar property created by the taxpayer's own efforts." *Jones v. Comm'r*, 129 T.C. 146, 159 (2007). The record, however, clearly demonstrates--and the Commissioner appears to concede--that the property which Taxpayer claimed as a charitable contribution was *not* created by his own personal efforts. Thus, we believe the tax court incorrectly applied § 1221(a)(3)(A) to the discovery material. n4 Nevertheless, for the reasons articulated below, we hold that § 1221(a)(3)(B) encompasses the discovery material donated by Taxpayer, thereby excluding it from the IRC's definition of capital asset. Accordingly, we affirm the tax court's ruling, albeit on alternative grounds. See *Combs v. Shelter Mut. Ins. Co.*, 551 F.3d 991, 996 (10th Cir. 2008) (noting that we are free to affirm on any grounds with a sufficient record to permit conclusions of law, even on grounds not relied upon by the trial court).

B.

Under § 1221(a)(3)(B) of the IRC, property described as a "letter, memorandum, or similar property" that is "prepared or produced" for a taxpayer, is excluded from the IRC's definition of "capital asset." 26 U.S.C. § 1221(a)(3)(B). Thus, the hypothetical sale of such property provides only ordinary income--meaning the allowable income tax deduction for donating the item to charity is limited to the taxpayer's basis in the property. See *Maniscalco*, 632 F.2d at 8. Because Taxpayer's lack of basis in the property here is undisputed, the central question before us is whether the discovery material qualifies as "letter[s], memorand[a], or similar property, [held by] a taxpayer

for whom such property was prepared or produced." 26 U.S.C. § 1221(a)(3)(B). n5 If the answer is yes, Taxpayer cannot claim an income tax deduction for donating the discovery material.

The starting point for interpreting § 1221(a)(3)(B) is the statute's plain language. See *Chickasaw Nation v. United States*, 208 F.3d 871, 876 (10th Cir. 2000). The words of the statute must be construed in their ordinary and everyday sense. See *id.* "If the terms of the statute are clear and unambiguous, they are controlling absent rare and exceptional circumstances." *Id.*

The items Taxpayer donated consisted of copies of FBI memoranda, lab reports, computer discs, and photographs--all containing information related to the investigation and prosecution of Timothy McVeigh. In addition, the discovery material included letters to Taxpayer from the FBI and the Department of Justice explaining the contents of the material. We have no trouble concluding, therefore, nor does Taxpayer seriously contest, that the discovery material is properly characterized as "letter[s], memorand[a], or similar property." 26 U.S.C. § 1221(a)(3)(B).

We next consider whether the material was "prepared or produced" for Taxpayer. The dictionary is a helpful basis for determining the plain and ordinary meaning of a statute's terms. See *Chickasaw*, 208 F.3d at 876. Webster defines "prepare" as "to make ready beforehand for some purpose, use, or activity." Merriam-Webster Online Dictionary (2009) (Webster). Similarly, the Oxford English Dictionary defines "prepare" as "[t]o bring into a suitable condition for

some future action or purpose; to make ready in advance; to fit out, equip." Oxford English Dictionary Online (2009) (Oxford). Webster defines "produce" as "to offer to view or notice." Webster, supra. Likewise, Oxford defines "produce" as "[t]o bring forward or out, to present to view or notice; to show or provide (something) for consideration, inspection, or use; to exhibit." Oxford, supra.

Taxpayer argues that the discovery material does not fall under § 1221(a)(3)(B) because it was not produced specifically for him. Admittedly, the discovery material was not originally created for Taxpayer's benefit. Rather, the Government first compiled the material to assist in its investigation and prosecution of McVeigh. Nevertheless, we believe the discovery material falls under 26 U.S.C. § 1221(a)(3)(B)'s plain language. The Government made numerous copies of memoranda, investigative reports, photographs, etc., specifically for Taxpayer. Subsequently, they organized and categorized all the material for the benefit of Taxpayer and his client. The Government then placed the discovery material in banker's boxes and prepared letters for Taxpayer explaining the contents of each box. Clearly, the discovery material was "br[ought] into a suitable condition," Oxford, supra, and "made ready" for Taxpayer's future use. Webster, supra. The Government then produced the discovery material for Taxpayer, *i.e.*, the Government "offered," Webster, supra, or "present[ed]" the material to Taxpayer for his "view," "consideration," and "use" in representing McVeigh. Oxford, supra.

We note that the discovery material was provided to Taxpayer only because of his position as lead counsel

for McVeigh, and it was the type of material typically produced for defense counsel in the course of a criminal trial. See *Morrison v. Comm'r*, 71 T.C. 683, 689 (1979) (holding that letters, memoranda, and similar property prepared by third parties and delivered to a Congressman were prepared or produced for a legislator as part of his duties, and, therefore, were excluded from the IRC's definition of capital asset). Further, while not critical to the outcome here, our conclusion is supported by the Supreme Court's suggestion that the IRC's capital asset exclusions should be construed broadly. See *Corn Products Refining Co. v. Comm'r*, 350 U.S. 46, 52, 76 S. Ct. 20, 100 L. Ed. 29, 1955-2 C.B. 512 (1955) (indicating that the exclusions to the definition of capital asset should be interpreted broadly); see also *Arkansas Best*, 485 U.S. at 223 (recognizing that Corn Products involved a broad reading of the § 1221(a)(1) inventory exception to the definition of capital asset); *Watkins*, 447 F.3d at 1271-72 (noting courts' reticence in treating property as a capital asset when it is more properly characterized as ordinary income).

Accordingly, we hold that the discovery material donated by Taxpayer falls within the plain language of 26 U.S.C. § 1221(a)(3)(B)--thereby limiting the charitable deduction amount to Taxpayer's basis in the property. See *Morrison*, 71 T.C. at 689 (holding that a Congressman's charitable contribution deduction for letters, memoranda, and similar property provided to him by third parties during the course of his legislative duties was limited to his basis in the property). Because Taxpayer had no basis in the discovery material, he is precluded from claiming any income tax deduction for his charitable donation.

For the foregoing reasons, the judgment of the tax court is AFFIRMED.

Footnote(s)

1 Because the deficiency notice was for a joint tax return, Sherrel and Leslie Stephen Jones both appeal the tax court's decision. For purposes of this opinion, however, we refer only to Leslie Stephen Jones as "Taxpayer."

2 The Commissioner's recovery of deficiencies on Taxpayer's income tax returns from 1997-1999 was barred by the statute of limitations.

3 Because we hold that the donated discovery material is *not* a capital asset, we need not decide whether Taxpayer (1) owned the discovery material, and (2) whether he owned the material for over one year.

4 The tax court's primary ruling that Taxpayer did not own the discovery material seems to have confined its interpretation of § 1221(a)(3). Thus, the tax court determined that the only way Taxpayer could have owned the donated materials was if the materials constituted attorney work product. Because we find the discovery material unambiguously falls under § 1221(a)(3)(B)'s exception to capital asset, we need not reach the question of Taxpayer's ownership interest in the discovery material.

5 We note that the Commissioner originally argued before the tax court that the discovery material falls within the § 1221(a)(3)(B) exception. The Commissioner reasserts this argument on appeal.

No. 20253-04

UNITED STATES TAX COURT

SHERREL AND LESLIE STEPHEN JONES,
Petitioners
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

November 1, 2007, Filed

COUNSEL: Clarke Lewis Randall, for petitioners.

Elizabeth Downs, for respondent.

JUDGES: Cohen, Mary Ann

OPINION BY: MARY ANN COHEN

OPINION

COHEN, Judge: Respondent determined deficiencies of $ 3,675 and $ 11,109.99 in petitioners' Federal income tax for 2000 and 2001, respectively. Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the years in issue. The sole issue for decision is whether petitioners are entitled to charitable contribution deduction carryovers for 2000 and 2001 with respect to the 1997 donation of a collection of copies related to one of petitioner's client's case files.

FINDINGS OF FACT

Some of the facts have been stipulated, and the stipulated facts are incorporated into our findings by this reference. Petitioners resided in Oklahoma during the years in issue and at the time they filed their petition.

From the date of his appointment by the United States District Court in May 1995 until his withdrawal in August 1997, petitioner Leslie Stephen Jones (petitioner) was lead counsel for the defense of Timothy McVeigh (McVeigh), who was prosecuted for and convicted of the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma (the Oklahoma City bombing). During the course of his representation of McVeigh and for use in the preparation of his legal defense, petitioner was periodically provided with photocopies of documents and copies of certain tangible objects that were prepared, created, or compiled by agencies of the U.S. Government for the purposes of investigating the Oklahoma City bombing and prosecuting that crime (materials). Petitioner always notified McVeigh of the materials received from the Government and delivered them to McVeigh whenever he requested them and for however long McVeigh desired to keep them.

The materials that petitioner received from the Government in connection with his representation of McVeigh included: Copies of 17,802 Federal Bureau of Investigation (FBI) "320s" (statements of interviews with relevant witnesses); copies of 9,743 FBI "Inserts" (statements of interviews with nonrelevant witnesses); copies of 25,141 pieces of documentary evidence assembled by the FBI; copies of 25,000 pages of FBI notes; copies of 168 files of medical examiner's reports;

100,000 color or black and white photographs taken by Government agencies during the investigation; copies of 1,417 audio and video cassettes made by Government agencies during the investigation; copies of 1,320 computer disks compiled by Government agencies during the investigation; copies of correspondence written by McVeigh to family and friends and acquired by the Government during its investigation (98 letters, 17 postcards, and 11 envelopes); a copy of a text of the Declaration of Independence containing notes made by McVeigh; copies of investigative materials that were compiled by the Government in its prior investigation of David Koresh (5 boxes of FBI 320s and 5 boxes of transcripts); and copies of Government expert summary reports. None of the materials described above bears an original signature of or original notation by McVeigh or any other person. None of the original items, of which copies are included in the materials described above, were prepared personally by petitioner or for him by anyone under his direction.

Several interested entities, including the U.S. Department of Justice, the U.S. Department of the Treasury, the Oklahoma State Bureau of Investigation, the Oklahoma County District Attorney's Office, and the defense team of Terry Nichols, a convicted conspirator in the Oklahoma City bombing, were provided the same materials or a substantial part of the same materials that petitioner received from the Government in connection with his representation of McVeigh. McVeigh's attorneys on appeal were also provided with copies of the same materials received by petitioner and the other members of McVeigh's defense team during McVeigh's initial trial.

Petitioner contacted the University of Texas at Austin to propose donation of the materials on August 27, 1997, the same day that he was allowed to withdraw from representation of McVeigh. Petitioner required, as a primary condition for making the gift, that the deed of transfer be executed before the end of 1997, without regard to physical delivery of the materials. From the beginning of formal discussions regarding the potential donation, petitioner placed restrictions on his donation of the materials. Petitioner required that investigative reports given to petitioner by Terry Nichols's attorney remain sealed and that photographs of the deceased victims of the Oklahoma City bombing remain sealed forever. He also required that the University of Texas provide private work space and staff assistance for petitioner or his designated agents to review the materials. Petitioner required that the University of Texas pay both the storage costs with respect to the materials from the date of acknowledgment of the deed of gift in December 1997 until the date of actual delivery of the materials in January 1999 and the shipping costs for delivery of the materials. Petitioner also required that the University of Texas pay for his designated agent to review and organize the materials between the time that the deed of gift was executed and the date of delivery. The review for which the University of Texas paid included determinations by petitioner or his agent about whether certain documents should be removed from the donated materials due to privilege and confidentiality concerns.

On December 24, 1997, petitioner executed a document entitled "Deed of Gift and Agreement", which memorialized the transfer by petitioner to the Center for American History at the University of Texas at

Austin (University of Texas), a qualifying charitable organization under section 170(c), of the above-described materials that petitioner received from the Government during the preparation of McVeigh's legal defense.

On May 1, 1998, John R. Payne (Payne), employed by petitioners to value the materials for the purpose of their claiming a charitable contribution deduction, appraised the materials at $ 294,877. Payne spent only one day reviewing the materials, which included hundreds of thousands of items contained in 171 boxes. He reviewed only a small percentage of the materials before assessing their value. Although he discounted his preliminary value assessment by 50 percent because none of the materials were originals, Payne did not take into consideration that multiple copies of the materials had been distributed to various attorneys during the course of the underlying trial. Payne's appraisal method in part involved assessing the value of certain documents at the price that a legal research service would charge for access to them. His appraisal method also relied heavily on purchase prices or assessed values of document archives that Payne considered to be comparable collections. All of the collections to which Payne compared the materials possessed by petitioner as part of McVeigh's case file, however, consisted primarily of original documents, handwritten letters, and original signatures of players in other infamous crimes or scandals. None of the materials in issue are original documents, and none contain an original signature or notation of McVeigh or any other person.

Petitioners claimed a deduction of $ 294,877 on their joint Federal income tax return for 1997 for the

donation of the materials. The deductions at issue in this case were carried over from petitioners' 1997, 1998, and 1999 Federal income tax returns.

Respondent disallowed the charitable deduction claimed by petitioners for the donation of the materials related to the criminal prosecution of McVeigh for the Oklahoma City bombing because respondent determined that petitioner did not personally own the materials that were provided to him for the purpose of preparing McVeigh's legal defense.

OPINION

[HN1] In order to be eligible for a charitable contribution deduction under section 170(a), a taxpayer must make a gift of property to a qualifying charitable organization. Sec. 170(c). The parties agree that the University of Texas is a qualifying charitable organization for purposes of section 170, but they disagree about whether petitioner legally owned the materials and thus whether his donation and transfer of possession of the materials effected a valid gift. In applying a provision of Federal tax law, State law controls in determining the nature of a taxpayer's legal interest in property. *United States v. Natl. Bank of Commmerce*, 472 U.S. 713, 722, 105 S. Ct. 2919, 86 L. Ed. 2d 565 (1985); *United States v. Mitchell*, 403 U.S. 190, 197, 91 S. Ct. 1763, 29 L. Ed. 2d 406 (1971). State law creates legal interests, while Federal law determines when and how those interests shall be taxed. *United States v. Mitchell*, supra at 197. In order to make a valid gift for Federal tax purposes, a transfer must at least effect a valid gift under the applicable State law. See *Woodbury v. Commissioner*, 49 T.C. 180, 193-194 (1967).

In the case of a valid gift, the amount of an otherwise allowable deduction for the charitable contribution of property that would produce ordinary income if sold at its fair market value is limited to the donor's cost or basis in the contributed property. Sec. 170(e)(1)(A); *Chronicle Publg. Co. v. Commissioner*, 97 T.C. 445, 447-448 (1991).

We thus first consider whether petitioner owned the materials donated such that he was capable of making a valid gift under the law of the State of Oklahoma. In determining what the relevant State law is, that State's highest court is the best authority on its own law. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967).

Under Oklahoma law, three elements must be present in order to effect a valid inter vivos gift: First, the donor must possess a donative intent; second, actual delivery of the subject matter of the gift must be completed; and, third, the donor must strip himself of all ownership and dominion over the subject matter of the gift. *Frazier v. Okla. Gas & Elec. Co.*, 1936 OK 524, 178 Okla. 512, 63 P.2d 11, 13 (Okla. 1936). In order to divest himself of ownership and dominion over the subject matter of the gift, petitioner (the donor) must legally own the property in issue. See *Pettit v. Commissioner*, 61 T.C. 634, 639 (1974) ("A 'gift' has been generally defined as a voluntary transfer of property by the owner to another without consideration therefor." (Emphasis added.)). Beneficial ownership is required. Bare legal title does not control. See *Estate of Davenport v. Commissioner*, 184 F.3d 1176, 1182-1185 (10th Cir. 1999), affg. T.C. Memo. 1997-390; sec. 25.2511-1(g)(1), Gift Tax Regs.

Respondent contends that petitioner did not own the materials relating to his defense of McVeigh in his trial for the Oklahoma City bombing and thus could not have divested himself of ownership in order to effect a valid inter vivos gift of those materials. Petitioners assert that, under Oklahoma law, petitioner legally owned the materials in issue and that the materials constituted petitioner's personal property.

The parties have not cited, and we have not found, any case in Oklahoma or any other jurisdiction that addresses directly the ownership of materials in the possession of an attorney that are related to the representation of his client. The ownership of client files is apparently an issue of first impression under Oklahoma law. However, Oklahoma State law in related areas provides us with general guidance, and we are assisted in our analysis by a repository of relevant cases decided by courts in other jurisdictions that have considered the issue of ownership of client files and their specific contents.

Petitioners maintain that, because petitioner at all relevant times exercised possession and control of the materials, petitioner was the legal owner of those materials until he donated them to the University of Texas. Petitioners argue further that, because McVeigh did not typically hold any of the materials in excess of 72 hours, McVeigh did not exhibit control or dominion over the materials and therefore could not be the legal owner of them.

As a general rule under Oklahoma law, possession of personal property is, if unexplained, prima facie evidence of ownership. *Ragan v. Citizen's State Bank*,

1913 OK 265, 38 Okla. 65, 131 P. 1093 (Okla. 1913). Petitioners rely heavily on this general principle of law to support their assertion of petitioner's ownership of the materials. Due to the unique fiduciary relationship between an attorney and his client, however, we are not persuaded that items in an attorney's possession, and especially in a client's case file, generally constitute the attorney's personal property. Ethical rules regarding an attorney's obligation to maintain funds and other property belonging to his client or a third party separate from the attorney's own property, for example, indicate the attorney's essential role as a fiduciary charged with safekeeping his client's property and interests. See Okla. Stat. Ann., tit. 5, ch. 1, app. 3-A, R. 1.15 (West 2001). Due to the fiduciary nature of an attorney's relationship to his client, we cannot treat petitioner's possession of the materials as prima facie evidence of his ownership. Petitioner's uncontested possession of the materials neither proves ownership nor establishes petitioners' eligibility for a charitable contribution deduction with regard to their donation of the materials.

Respondent argues that general principles of agency law and ethical rules governing the conduct of attorneys establish that petitioner did not own the materials and was not entitled to dispose of them. Respondent contends that petitioner received the materials as an agent of McVeigh during the course of defending McVeigh in his trial for the Oklahoma City bombing and that the materials thus belong to McVeigh, not petitioner. Petitioners maintain that general agency law is inapplicable to this case and that, although his clients may possess a right of access to information in their case files, petitioner, as attorney, is

the rightful owner of his clients' case files. Alternatively, petitioners argue that, even if we hold that clients own their case files under Oklahoma law, attorneys are entitled to keep copies of their clients' case files, and, because the materials contained only copies of documents and other evidence, petitioner rightfully owned them. We infer that petitioners' argument is essentially that an attorney's right to copy and keep client files for himself is equivalent to traditional rights of ownership, including the right freely to dispose of property.

Central to our analysis of ownership is the principle that the attorney-client relationship is fundamentally one of agency. See *Comm'r v. Banks*, 543 U.S. 426, 436-437, 125 S. Ct. 826, 160 L. Ed. 2d 859 (2005); State ex rel. Okla. Bar *Association v. Taylor*, 2000 OK 35, 4 P.3d 1242, 1253 (Okla. 2000); *Crisp, Courtemanche, Meador & Associates v. Medler*, 1983 OK CIV APP 11, 663 P.2d 388, 390 (Okla. Civ. App. 1983). Generally, an agency relationship is one in which the parties agree that one party is to act on behalf of another. *Garrison v. Bechtel Corp.*, 1995 OK 2, 889 P.2d 273, 283 (Okla. 1995). Because an attorney is the agent of his client, the delivery of the materials to petitioner occurred within the scope of the agency relationship. The materials were delivered to petitioner from the Government in the course of his preparation for the defense of McVeigh. The materials were for McVeigh's benefit and were delivered to allow him and his attorney better to prepare his case for trial. Indisputably, the materials were delivered to petitioner within the scope of his representation of McVeigh's criminal prosecution for the Oklahoma City bombing and thus were received by petitioner as the agent of McVeigh.

Petitioners assert that general principles of agency law do not resolve the issue of ownership, and they rely instead on several cases from other jurisdictions that have considered the issue of ownership of client case files. Those cases generally hold that an attorney or accountant, not his client, has property rights in the portions of his client's case file containing the professional's self-created work product or working papers, generally defined as the attorney's or accountant's notes, drafts, and internal memoranda recording the professional's ideas, opinions, and impressions. See *Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus*, 824 S.W.2d 92, 96 (Mo. Ct. App. 1992). For similar holdings with respect to accountants and their working papers, see also *Ipswich Mills v. Dillon*, 260 Mass. 453, 157 N.E. 604 (Mass. 1927), and *Ablah v. Eyman*, 188 Kan. 665, 365 P.2d 181 (Kan. 1961). Although petitioners rely heavily on these cases, they represent a small fraction of the jurisdictions that have considered the issue of ownership of an attorney's or an accountant's work product.

The majority of courts that have considered the issue of whether attorneys or clients own case files have held that clients are the legal owners of their entire case files, including the attorney's work product for which the client paid when he purchased the attorney's services. See *Swift, Currie, McGhee & Hiers v. Henry*, 276 Ga. 571, 581 S.E.2d 37, 39 (Ga. 2003) (citing *Resolution Trust Corp. v. H----*, P.C., 128 F.R.D. 647 (N.D. Tex. 1989); In re Kaleidoscope, Inc., 15 Bankr. 232, 241 (Bankr. N.D. Ga. 1981), revd. on other grounds 25 Bankr. 729 (N.D. Ga. 1982); In re *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P.*, 91

N.Y.2d 30, 689 N.E.2d 879, 882-883, 666 N.Y.S.2d 985 (N.Y. App. Div. 1997)); see also *Averill v. Cox*, 145 N.H. 328, 761 A.2d 1083, 1092 (N.H. 2000); In re X.Y., 529 N.W.2d 688, 690 (Minn. 1995). These courts have held that the creation of the case file is part of the services for which the client pays his attorney, and they have justified their holdings that clients have full access to and superior property rights in their entire case file based primarily on the principle that the fiduciary relationship between attorney and client necessitates full disclosure. See, e.g., *Resolution Trust Corp. v. H----, P.C .*, supra at 649-650; see also Swift, Currie, McGhee & Hiers v. Henry, supra at 40; In re Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P., supra at 882.

However, some courts have held that ownership of a case file is divided between attorney and client. These jurisdictions generally hold that an attorney's work product, including internal legal memoranda and preliminary drafts of documents, remains the property of the attorney; however, the client has superior property rights in the end product of the attorney's representation, which includes finalized legal documents, pleadings filed, correspondence among parties, and other papers "'exposed to public light by the attorney to further [the] client's interests'". *In re Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P.*, 689 N.E.2d at 881-882 [(quoting *Fed. Land Bank v. Fed. Intermediate Credit Bank*, 127 F.R.D. 473, 479 (S.D. Miss. 1989), modified 128 F.R.D. 182

(S.D. Miss. 1989)); see also *Apa v. Qwest Corp.*, 402 F. Supp. 2d 1247, 1250 (D. Colo. 2005) (upon termination of

representation, attorney must surrender case file to client and the "cost of making a copy of a client file by a withdrawing lawyer belongs to the lawyer, not the client"; however, duplication costs may be charged to the client for copies of the attorney's work product); *Loeffler v. Lanser* (In re ANR Advance Transp. Co.), 302 Bankr. 607, 614 (E.D. Wis. 2003) (concluding that the difference between the majority and minority rules is primarily who bears the burden of proving need for disclosure or secrecy, respectively, with regard to the attorney's work product); *Womack Newspapers, Inc. v. Town of Kitty Hawk*, 181 N.C. App. 1, 639 S.E.2d 96, 104 (N.C. Ct. App. 2007) ("anything in a client's file, which is in the hands of the client's attorney, belongs to the client, with the exception only of the attorney's notes or work product"). One State appellate court has held explicitly that, while a client may be entitled to access his attorney's work product in order to understand the services provided by the attorney, the attorney's fiduciary duties to his client do not necessitate the conclusion that the client has a property right or ownership interest in the attorney's work product. *Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, supra* at 98. While the opinions of courts in other jurisdictions are persuasive and helpful in our analysis, we must ultimately determine whether, and to what extent, an attorney or his client owns the client's case file under Oklahoma State law.

The Oklahoma Rules of Professional Conduct generally imply that clients have ownership rights in their case files under Oklahoma law. Rule 1.6 of the Oklahoma Rules of Professional Conduct, which codify general principles regarding an attorney's ethical duties and fiduciary responsibilities to his client, provides: (a) A

lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation

Okla. Stat. Ann. tit. 5, ch. 1, app. 3-A, R. 1.6(a) (West 2001).

Petitioners assert that rule 1.6, Oklahoma Rules of Professional Conduct, is irrelevant because petitioner testified without contradiction that McVeigh waived the attorney-client privilege and the protection of the work product privilege. Petitioner did not testify about any particulars regarding McVeigh's alleged waiver of the attorney-client privilege or present any evidence to support his claim that his client did waive the attorney-client privilege with regard to the materials. Petitioner's testimony alone, even if uncontradicted, does not establish McVeigh's waiver of the attorney-client privilege. See *Boyett v. Commissioner*, 204 F.2d 205, 208 (5th Cir. 1953), affg. a Memorandum Opinion of this Court. Confidentiality is a hallmark of the attorney-client relationship, and the attorney's mere conclusion that the client waived that privilege is not sufficient evidence of an explicit waiver. In the absence of evidence establishing that McVeigh consented to disclosure by his attorney of the materials in issue, petitioner is bound by his ethical obligations under the Oklahoma Rules of Professional Conduct to refrain from disclosing and capitalizing on information related to his representation of McVeigh.

Rules 1.15 and 1.16 of the Oklahoma Rules of Professional Conduct also support our holding. Rule

1.15 requires that an attorney safeguard all clients' property in the attorney's possession and preserve records of account funds and other property for at least 5 years after representation is terminated. Okla. Stat. Ann. tit. 5, Ch. 1, App. 3-A, R 1.15(a). Rule 1.16, Oklahoma Rules of Professional Conduct, requires:

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as surrendering papers and property to which the client is entitled The lawyer may retain papers relating to the client to the extent permitted by other law.

Okla. Stat. Ann. tit. 5, Ch. 1, App. 3-A, R 1.16(d). The Comment to rule 1.16 explains the last clause of the quoted rule above by noting that the attorney may retain papers as a security for a fee only to the extent permitted by law.

The Oklahoma Rules of Professional Conduct cited above illustrate the fiduciary nature of the attorney-client relationship. They emphasize the attorney's duty to keep details of his representation of a client confidential, even after the representation has been terminated, and they suggest that, while an attorney may retain documents related to his representation of the client in certain situations, those documents rightfully belong to the client and should not be disposed of or exposed in a way that may be detrimental to the client. Although McVeigh cannot and his successors likely will not attempt to have the Oklahoma Rules of Professional Conduct enforced against petitioner, the rules do suggest that petitioner is not the exclusive owner of the materials, regardless

of his rightful possession of the materials themselves or of additional copies of those materials, and that petitioner was not entitled to dispose of, publicize, or capitalize on them for his personal gain.

Petitioners rely primarily on *Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus*, 824 S.W.2d at 98, to support their assertion of petitioner's exclusive legal ownership of the materials in issue in this case. However, the court in Corrigan was faced with the narrow question of ownership of notes, working papers, drafts, and internal memoranda written by the attorney, over which the client in that case asserted an ownership interest superior to that of her attorney. *Id.* at 96. The materials in issue in this case are distinguishable from those in the Corrigan case because they are not petitioner's work product and do not contain his ideas, opinions, or impressions. See *id.*

Because the materials are not work product, it is not necessary for us to determine in this case whether Oklahoma would follow the majority or minority view with regard to ownership of case files. We are aware of no court that has held that clients have no ownership interests in their respective case files. Rather, as we have summarized above, all jurisdictions that have considered explicitly the issue of ownership of case files have held that clients have superior property rights in at least those items in the case file that are not the attorney's self-created work product. Those courts that have reserved a property right to the attorney have done so only with regard to the attorney's personal notes, working drafts and papers, and internal memoranda. The materials in issue in this case fall outside of this work product exception. Thus, under

either approach, the documents in issue in this case belong properly to petitioner's client, McVeigh, and not to petitioner. Petitioner, in effect, was merely the authorized and incidental custodian of the copies in issue and had no ownership rights sufficient to effect a gift or support a charitable contribution deduction under section 170. See *Pettit v. Commissioner*, 61 T.C. at 639.

Although not dispositive, it is also relevant that Oklahoma law recognizes a common law possessory or retaining lien with respect to an attorney's retention of his client's papers, money, or other property that are in the attorney's possession until fees for services rendered are paid by the client. *Britton & Gray, P.C. v. Shelton*, 2003 OK CIV APP 40, 69 P.3d 1210, 1212 (Okla. Civ. App. 2003) (citing *State ex rel. Okla. Bar Association v. Cummings*, 1993 OK 127, 863 P.2d 1164, 1168-1170 (Okla. 1993)). The existence of such a retaining lien supports our conclusion that Oklahoma law generally considers property that is held by an attorney in the scope of representing his client as properly belonging to the client, against whose possessory interest the retaining lien may attach.

Petitioners argue further that, because it is undisputed that attorneys are entitled to retain copies of their clients' case files even after surrendering them to their clients and because the materials are copies, not originals, the copies belong legally to petitioner, and thus he may claim an ownership interest in them. We are not persuaded by petitioners' implicit argument that an attorney's right to maintain a copy of his client's file after termination of representation includes a right to publicize, sell, or otherwise dispose of the case file to

the attorney's benefit. Moreover, this argument by petitioners undermines their assertions as to the value of the collection of copies and the amount of their charitable contribution deduction. The appraisal of copied documents from an attorney's case file as if it contained originals or the only set of documents, even if discounted by 50 percent because all the documents were photocopies, and without regard to the existence of multiple sets of the copies, is a major defect in the Payne appraisal.

Finally, even if the materials were the work product of petitioner such that he was potentially the legal owner of them, petitioners would not be entitled to a charitable contribution deduction for the donation of them. The amount of any charitable contribution of property otherwise taken into account for the deduction under section 170(a) must be reduced by the amount of gain that would not have been long-term capital gain (i.e., by the amount of gain that would have been ordinary gain) if the property contributed had been sold by the taxpayer at its fair market value. Sec. 170(e)(1)(A). Thus, unless the materials were long-term capital assets, petitioners' deduction, if otherwise allowable, would be limited to their cost or basis in the materials. See id. Section 1221(a)(3) specifically excludes from the definition of "capital asset":

(3) a copyright, a literary, musical, or artistic composition, a letter or memorandum, or similar property, held by --

(A) a taxpayer whose personal efforts created such property, [or]

(B) in the case of a letter, memorandum, or similar property, a taxpayer for whom such property was prepared or produced

Because the materials would fall under the exclusion of letters, memoranda, or similar property created by the taxpayer's own efforts, if they had been created by the taxpayer's own efforts and were work product, we would be required to treat them as ordinary assets. Thus, even if petitioners could fall within the minority work product exception to the general rule that a client's case file legally belongs to the client, their allowable deduction would be limited to their basis in the materials. Petitioners have presented no evidence that the basis in the materials was greater than zero. Thus, even if we held that petitioner legally owned the materials under a work product exception, section 170(e)(1)(A) would limit petitioners' deduction to zero, the amount of petitioners' basis.

Because petitioner was not the legal owner of the materials, he was not legally capable of divesting himself of the burdens and benefits of ownership or effecting a valid gift of the materials. He is therefore not entitled to any deduction under section 170 for his donation of the materials. Because the materials contain merely copies of documents and other items that have been duplicated many times and are in the possession of many different people and entities, we have serious doubts about the value asserted by petitioners' appraiser. However, because petitioner was not the legal owner of the materials and was not legally entitled to donate them, we need not reach the valuation issue.

We have considered all arguments by the parties, and, to the extent not mentioned, we conclude that they are moot, irrelevant, or without merit.

To reflect the foregoing,

Decision will be entered for respondent.

No. 08-9001
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SHERREL AND LESLIE STEPHEN JONES,
Petitioners-Appellants,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

APPEAL FROM THE UNITED STATES TAX COURT. (Case No. 20253-04).

Filed 5/13/2009

ORDER

Before TACHA, BALDOCK and O'BRIEN, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court,
ELISABETH A. SHUMAKER, Clerk